

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1200

Late Application for Review Allowed
Reversed
No Disqualification

PROCEDURAL HISTORY: On May 9, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was therefore disqualified from receiving unemployment insurance benefits effective April 10, 2022 (decision # 123858). Claimant filed a timely request for hearing. On November 4, 2022, ALJ D. Lee conducted a hearing, and on November 10, 2022 issued Order No. 22-UI-207136, affirming decision # 123858. On November 30, 2022, Order No. 22-UI-207136 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On December 5, 2022, claimant filed a late application for review with EAB.

WRITTEN ARGUMENT: Claimant's February 15, 2023 argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is the December 5, 2022 written statement claimant included with her application for review explaining why the application for review was late, and has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

FINDINGS OF FACT: (1) Sleep Dentistry of Portland employed claimant as a practice manager from April 30, 2018, until April 14, 2022. The employer operated two dental practices. One was located in Vancouver, Washington, and the other, which claimant managed, was located in Portland, Oregon.

(2) In July 2020, claimant was sexually assaulted at work by the then clinical director of the dental practice. After discussions with the owner and lawyer, and due in part to prior lawsuits and media attention against the business, claimant decided to “stay silent for the company.” The person who assaulted claimant was fired. Sometime after the assault, claimant was diagnosed with post-traumatic stress disorder (PTSD). Claimant did not file suit against the employer for their potential liability arising from this incident by the time of claimant’s work separation.

(3) Over time, claimant became increasingly concerned about the safety of patients and doctors, and also what she perceived to be an unprofessional degree of closeness between the practice manager of the Vancouver location and the employer’s owner. Claimant requested that the employer implement a new leadership structure. Claimant believed that without a better structure the work environment was a “free for all” and a “free for all ends up getting somebody getting assaulted.” Transcript at 32. The employer’s owner stated he would consider the proposed new leadership structure. Claimant continued to advocate for the structural change in leadership. The employer’s owner did not communicate to claimant that he was not in agreement with the proposed leadership structure changes until April 14, 2022.

(4) By early March 2022, claimant’s dissatisfaction with the way the Vancouver practice was managed, as well as the interactions she observed between the Vancouver manager and the employer’s owner, led claimant to conclude that she did not want to continue going “above and beyond” in her job and would do “the bare minimum” unless the leadership structure was changed as she requested. Transcript at 48. At this time, claimant stopped performing tasks over which she had assumed responsibility, but which she had not initially performed when hired, because she felt the tasks were not part of her position.

(5) The employer expected their employees would perform all tasks they were assigned and not make repeated requests of the employer after such requests had been denied.

(6) Upon claimant’s refusal to perform the tasks she no longer considered part of her position the employer informed claimant they desired claimant to continue performing these tasks. The employer did not discipline claimant for her refusal, nor warn her that her job was in jeopardy if she refused to perform these tasks.

(7) On or about April 8, 2022, the employer decided to discharge claimant for refusing to perform the assigned tasks claimant considered “above and beyond” what was required of her position, and because she continued to advocate for a new leadership structure, despite not having communicated to claimant he had decided against instituting the change. The employer did not convey his decision to discharge claimant at the time.

(8) On April 14, 2022, the employer’s owner met with claimant and told her that they would not be implementing her suggested change in leadership structure. In response, claimant told the employer that she would quit work once she secured other employment but would continue to work in the meantime. The employer then immediately discharged claimant.

(9) Order No. 22-UI-207136, mailed to claimant on November 10, 2022, stated, “You may appeal this decision by filing the attached form Application for Review with the Employment Appeals Board within 20 days of the date that this decision is mailed.” Order No. 22-UI-207136 at 4. Order No. 22-UI-207136

also stated on its Certificate of Mailing, “Any appeal from this Order must be filed on or before November 30, 2022 to be timely.”

(10) In November 2022, claimant’s grandmother was gravely ill and claimant was attending to her. As a result, claimant did not have the forms or information she felt she needed to file an application for review by November 30, 2022. She filed her application for review on December 5, 2022.

CONCLUSIONS AND REASONS: The late application for review of Order No. 22-UI-207136 is allowed. The employer discharged claimant, but not for misconduct.

Late application for review. An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a “reasonable time” upon a showing of “good cause.” ORS 657.875; OAR 471-041-0070(2). “Good cause” means that factors or circumstances beyond the applicant’s reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

The application for review of Order No. 22-UI-207136 was due November 30, 2022. Because claimant did not file her application for review until December 5, 2022, the application for review was late. Claimant stated that she was unable to file the application for review on or before November 30, 2022, because her grandmother was gravely ill and while attending to her, claimant lacked the forms and information needed to file the application. EAB Exhibit 1 at 1. Because this was a circumstance beyond claimant’s reasonable control, claimant has shown good cause to extend the filing period. Claimant’s statement did not indicate when the circumstance that prevented her timely filing ceased to exist, but, more likely than not, ceased on or after the original November 30, 2022 deadline. Because claimant’s application for review was filed within seven days of November 30, 2022, it was filed within a “reasonable time.” Accordingly, claimant’s late application for review is allowed.

Nature of the work separation. If an employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a).

The order under review concluded that the employer’s refusal to allow claimant to continue working, after announcing on April 14, 2022 that she would resign because the employer’s owner did not agree to change the leadership structure, constituted an acceptance of claimant’s resignation. Order No. 22-UI-207136 at 2. The order under review therefore concluded that claimant voluntarily quit the employment without good cause. Order No. 22-UI-207136 at 3-4. The record does not support this conclusion.

Both parties expressed a desire to end the employment relationship during the meeting of April 14, 2022. On this date, claimant told the employer she intended to quit as soon as she secured other suitable employment, while the employer had decided less than a week earlier that they would discharge claimant for failing to perform her job duties as requested, but had not yet informed claimant of this. Because claimant's announced resignation did not specify an effective date and claimant intended to continue working for the employer for an indefinite period thereafter, claimant did not sever the employment relationship on that day. However, the employer's announcement to claimant of the April 8, 2022 decision to discharge her, along with the employer directing claimant not to return to work, served to immediately sever the employment relationship. Therefore, the work separation is properly considered a discharge that occurred on April 14, 2022.

Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a). "[W]antonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's owner testified he would have allowed claimant to continue working for an additional period of time only if claimant would "show up consistently, continue helping in advertising. . . [and] recruiting staff as needed. . . and stop demanding she run both practices." Transcript at 48-50. The employer therefore discharged claimant when they did because employer believed claimant refused to perform certain tasks that she had come to regularly perform and conditioned her continued performance of these tasks on a change in the leadership structure of the practices that the employer's owner did not agree to make. It can therefore be inferred from the record that claimant's April 14, 2022 statement that she eventually intended to quit reinforced the employer's decision to discontinue the employment relationship and sever the relationship that day.

An employer has the right to expect that their employees will perform all tasks they are assigned and not make repeated requests of the employer after such requests have been denied. Claimant's repeated request that there was a change in the leadership structure, though characterized by the employer as an "ultimatum," was done through proper channels and in a respectful manner. Transcript at 25-26, 70. The employer delayed responding to the requests and ultimately denied the changes. While the employer apparently never seriously entertained granting claimant's request, they did not convey this to claimant until April 14, 2022. Because the employer deferred telling claimant that her request was denied until the date she was discharged, her continued advocacy for the request prior to learning of the denial was not a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee.

Further, even though claimant had taken on additional responsibilities over the course of her employment such as hiring doctors and advertising the business, claimant felt that these duties were

properly part of the employer's owner's duties, or duties of the dual-location practice manager position she proposed with the change of leadership structure. Transcript at 62. Since the employer declined to make these changes, claimant decided she should limit her duties to what she felt a Portland practice manager should do. While the employer reasonably expected that claimant would continue to perform all the tasks she had been performing, regardless of her job title, they failed to warn claimant that her employment as the Portland practice manager was in jeopardy if she did not perform them. The employer's actions in merely continuing to request that she perform the tasks, without imposing any consequence for refusing to perform them, reinforced claimant's belief that she could refuse to do anything she felt was outside the scope of her position. Claimant's refusal was, more likely than not, an effort to demonstrate the need for her proposed changes. It did not constitute a willful or wantonly negligent disregard of the employer's standards of behavior because the employer did not clarify that the assigned tasks were a part of claimant's job duties regardless of the pending decision on her proposal.

The employer's failure to clearly designate responsibility for the tasks in this manner, or warn claimant of the consequences of refusing to perform them, caused claimant to misunderstand the employer's expectations. Because claimant neither knew nor had reason to know what the employer's expectations were in this regard, her failure to understand them amounted to, at worst, mere negligence. The employer has therefore not proven by a preponderance of evidence that claimant violated their expectations willfully or with wanton negligence. Accordingly, the employer has not shown they discharged claimant for misconduct.

Claimant's late application for review on Order No. 22-UI-207136 is allowed. The employer discharged claimant, but not for misconduct, and she is therefore not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-207136 is set aside, as outlined above.

S. Serres and A. Steger-Bentz;
D. Hettle, not participating.

DATE of Service: February 17, 2023

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.